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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 214.

ERNEST R. FORREST, *Petitioner*,

vs.

ARCH R. JACK, Receiver of the Nephi National Bank of Nephi, Utah, a Corporation, *Respondent*.

BRIEF OF RESPONDENT.

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No. 214.

ERNEST R. FORREST, *Petitioner,*

vs.

ARCH R. JACK, Receiver of the Nephi National Bank of Nephi, Utah, a Corporation, *Respondent.*

BRIEF OF RESPONDENT.

STATEMENT OF CASE.

The statement of the case in the petition for writ of certiorari, pages 1-4, is adopted subject to the following corrections and additions (reference here being made to the page numbers of said petition):

Page 2. Although the state probate court entered an order on March 11, 1920, ordering distribution of the estate, petitioner did not file his application for discharge as administrator until November 18, 1931 (R. pp. 29-32) and the order of discharge was not filed until December 3, 1931, (R. 33) two days after the closing of the Nephi National Bank (R. 1).

Page 2. Record reference stated as (R. 20) should be (R. 19).

Page 3. Record reference (R. 33) should be (R. 32). Attention is called to the fact in this connection that the delivery of this stock to the bank was within the sixty day limitation of Sec. 64, Ch. 2, U. S. Code, Title 12, preserving liability upon the record owner.

Attention is further called to the fact that defendant at all times knew that the stock had not been transferred upon the books of the bank, notwithstanding he had delivered the stock to his mother as distributee (R. 22).

Page 3. The statements on page 3 concerning the theory of the case, that it was not tried upon equitable issues, and that there was a defect of parties, etc., are argumentative rather than allegations of fact. The theory of the case and the question of parties is discussed by respondent *infra* pages 36-38.

Page 3. The motions of plaintiff and defendant referred to on page 3 will be found in the record pages 23 and 24, and the denial of the motion of the plaintiff will be found in the record page 15.

Page 4. The record references (R. 48, 59) should be (R. 47-58).

A.

SUMMARY OF ARGUMENT.

I. The contingent assessment liability of Henry Forrest upon six shares of stock in the Nephi National Bank survived his death and became a liability of his estate. The stock was never transferred upon the books of the bank and stood in the name of the testator, Henry Forrest, at the time this suit was instituted. Consequently, the estate continued liable, and the contingent liability ripened into absolute liability when the assessment was levied on March 8, 1932, notwithstanding the state probate court had entered an order on March 11, 1920, authorizing, and the defendant as administrator had made, distribution of the entire assets of the estate, including the six shares of stock in question. The receiver was entitled to enforce collection of the assessment from the assets of the estate and could properly pursue such assets into the hands of the defendant, Ernest R. Forrest, as a grantee with notice from his mother, the distributee of the assets of the estate.

(A) THE CASE OF MATTESON V. DENT, 176 U. S. 521, RELIED UPON BY THE COURT BELOW, ESTABLISHED THE FEDERAL RULES THAT:

(1) The contingent assessment liability of a shareholder of a national bank constitutes a debt or obligation within the meaning of the assessment statutes and survives against and becomes a charge or lien upon, his estate;

(2) Such liability and lien continue against the estate so long as the stock is not transferred upon the books of the bank from the name of the deceased stockholder;

(3) The fact that assessment had not been levied at the time of distribution of assets of an estate (termed "allotments" in the case) does not prevent the contingent liability for assessment from constituting a debt or obligation of the estate, and a lien thereon, within the meaning and effect of the assessment statutes at the time of such distribution or allotment;

(4) The liability of the estate for the assessment being established under the foregoing rules, the receiver can enforce such liability against the allottees or distributees under a state law making them liable for the debts of the estate to the extent of the assets received by them from the estate.

(B) THE LAWS OF UTAH MAKE THE DEBTS AND OBLIGATIONS OF A DECEDENT A CHARGE OR LIEN UPON THE ASSETS OF HIS ESTATE, AND IN CONSEQUENCE PERMIT THE CREDITOR TO PURSUE THE ASSETS INTO THE HANDS OF THE HEIRS AND DISTRIBUTEES. HENCE, THE COURT BELOW WAS NOT IN ERROR IN HOLDING THAT THE ASSETS OF THE ESTATE OF HENRY FORREST TRACEABLE TO THE DEFENDANT, AS A GRANTEE WITH NOTICE FROM A DISTRIBUTEE OF THE ESTATE, WERE IMPRESSED WITH A LIEN BASED UPON THE ASSESSMENT LIABILITY.

(c) The Federal statutes create the assessment liability and make the same a charge or lien upon the assets of the estate of a decedent. Hence, regardless of state laws, such lien follows the assets into the hands of heirs and distributees and accordingly the court below was not in error in holding that the assets of the estate of Henry Forrest traceable to the defendant as a grantee with notice from a distributee of the estate were impressed with a lien based upon the assessment liability.

II. The "non-claim" statutes of Utah are no bar to the assertion of the assessment liability against the estate, and hence do not preclude the pursuit of said assets into the hands of the defendant under the doctrines established in Matteson v. Dent, supra, for the reasons that:

(a) Contingent claims, such as the assessment claim in question, are not within the purpose of the "non-claim" statutes of Utah.

(b) The assessment liability is created by Federal statute, is made a lien upon the estate by Federal statute, and, assuming, for discussion only, that the assessment claim is literally within the scope of the state "non-claim" statutes, the state statutes cannot prevail over the operative effect of the Federal statutes where relief is being sought in the Federal court.

III. The Court below committed no error in holding (a) that the trial court should have granted the plaintiff's motion to transfer the cause to the equity side to impress a lien for the assessment liability upon the assets acquired by the defendant from the estate, and (b) that notwithstanding the failure of the trial court to transfer the cause to the equity side, the court below had the power to make the transfer and consider the case as in equity and dispose of it on the record as presented upon reaching the conclu-

sion that it had been fully heard in the trial court and that there was no occasion for a retrial.

IV. The defendant may also be held liable to the receiver on the theory of devastavit, for the reason that, having permitted the estate to remain liable for the assessment by not causing the stock to be transferred upon the books of the bank to his mother, the legatee, or to some other competent person, and such liability still being in existence at the time he made the distribution of the assets of the estate as administrator, he thereupon became guilty of illegal dissipation of assets in that he did not take appropriate means either to provide for the outstanding contingent assessment liability or to eliminate and remove such assessment liability from the estate by a proper transfer of the stock upon the books of the bank from the name of the decedent.

B.

ARGUMENT.

I. The contingent assessment liability of Henry Forrest upon six shares of stock in the Nephi National Bank survived his death and became a liability and a charge, or lien upon, his estate. The stock was never transferred upon the books of the bank and stood in the name of the testator, Henry Forrest, at the time this suit was instituted. Consequently, the estate continued liable, and the contingent liability ripened into absolute liability when the assessment was levied on March 8, 1932, notwithstanding the state probate court had entered an order on March 11, 1920, authorizing, and the defendant as administrator had made, distribution of the entire assets of the estate, including the six shares of the stock in question. The receiver was entitled to enforce collection of the assessment from the assets of the estate and could properly pursue such assets into the hands of the defendant, Ernest R. Forrest, as a grantee with notice from his mother, the distributee of the assets of the estate.

(A) Discussion of the case of Matteson v. Dent, 176 U. S. 521, relied upon by the court below.

The court below based its decision as to the merits primarily upon the principles established by the case of Matteson v. Dent, *supra*. The analogy between the Matteson v. Dent case and the instant case is very close and is squarely in point upon the basic issues involved. In that case it appears that Matteson, who was the owner of ten shares of stock in a national bank duly registered upon the books of the bank in his name, died intestate in July, 1895, leaving surviving his widow and six children. The probate court of Minnesota appointed an administrator, who filed an inventory, in which was embraced the shares of stock in question. In September, 1896, a final decree of distribution of the assets, including the ten shares of stock, was entered. Under such decree the widow and the heirs acquired said assets and took the ten shares of stock in common ownership, in indivision, in proportion to their interests in the estate. In November, 1896, the bank became insolvent and a receiver for the same was appointed by the Comptroller of the Currency. In January, 1897, the Comptroller made an assessment upon the shareholders of the bank under the Federal statute. No transfer of the stock upon the books of the bank had been made, and the receiver having given due notice of the assessment sued in the state court to recover from the widow and children of Matteson, as next of kin, the amount of the assessment, the suit being brought under the Minnesota statutes permitting an action by a creditor of the estate of a deceased person against the next of kin to recover the distributed assets received from the estate, or so much thereof as might be necessary to satisfy a debt of the estate. Service was had only upon the widow and one of the children. A demurrer to the complaint was filed, overruled, and, upon appeal the order overruling the demurrer was sustained by the Supreme Court of the state. 70 Minn. 519; 73 N. W. 416. Thereafter the demurring defendants answered upon the merits, denying liability, and a

motion for judgment upon the pleadings was thereupon made and granted, and judgment was entered in favor of the receiver, against the defendants, and each of them, in the sum of $1,000 with interest. The judgment was affirmed on appeal by the Supreme Court of the state (75 N. W. 1041) and a writ of error was thereafter allowed, thus presenting the case to the Supreme Court of the United States for review. This court affirmed the judgment, and established, inter alia, the four principles following:

(1) *The contingent assessment liability of a shareholder of a national bank is a debt or obligation within the meaning of the assessment statutes, and survives against and becomes a charge or lien upon his estate.*

In support of the foregoing, this court said:

> "Because the insolvency of the bank took place *after the death* of Matteson, did it result that the assessment, which was predicated upon the insolvency, was not a debt of his estate? To so decide the statute must be construed as imposing the liability on the shareholder for the amount of his subscription when necessary to pay debts, only in case insolvency arises during the lifetime of the shareholder. In other words, that all liability of shareholders to contribute to pay debts ceases by death. This construction, however, would be manifestly unsound. The obligation of a subscriber to stock to contribute to the amount of his subscription for the purpose of the payment of debts is contractual, and arises from the subscription to the stock. True, whether there is to be a call for the performance of this obligation depends on whether it becomes necessary to do so in consequence of the happening of insolvency. *But the obligation to respond is engendered by and relates to the contract from which it arises.* This contract obligation, existing during life, is not extinguished by death, but like other contract obligations survives and is enforceable against the estate of the stockholder." (Pages 524-525; italics inserted.)
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>
> "The question was settled in *Richmond v. Irons,* 121 U. S. 27, where the court said (pp. 55, 56):

" 'Under the national banking act the individual liability of the stockholders is an essential element of the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholder. We hold, therefore, that the obligation of the stockholder survives as against his personal representatives. *Flash v. Conn.*, 109 U. S. 371; *Hobart v. Johnson*, 19 Blatchford, 359. In Massachusetts it was held, in *Grew v. Breed*, 10 Metc. 569, that administrators of deceased stockholders were chargeable in equity, as for other debts of their intestate, in their representative capacity.' " (pp. 526-527.) (Italics inserted)

(2) *Such liability and lien continue against the estate so long as the stock is not transferred upon the books of the bank from the name of the deceased stockholder.*

In support of the foregoing the court quoted with approval from the case of Davis v. Weed, 7 Fed. Cas. 186, as follows:

" 'The original liability of the intestate to pay the assessments which may be ordered by the Comptroller was a voluntary agreement, evidenced by his subscription or by his becoming a stockholder. It is not imposed by way of forfeiture or penalty. It is imposed by the statute, but it also exists by virtue of the contract which the intestate entered into when he became a stockholder. When the stockholder dies his estate becomes burdened with the same contract or agreement which the dead man had assumed, and so long as it, through the executor or administrator, holds the stock as the property of the estate, and the stock has not been transferred on the books of the bank, and the lia-

bility has not been discharged by some act which shows that the new stockholder has taken the place of the old one, the contract liability still adheres to the estate. This liability is not the result of any new contract, for the administrator did not voluntarily become the owner of the stock; it came to him as the dispenser of the goods of the dead, and the liability rested upon the stock, and was a part of the contingent liability of the estate, at least until it was transferred to some other person by a transfer free from fraud.' " (p. 526.) (Italics inserted)

The court also quoted with approval, from the case of Bailey v. Holister, 26 N. Y. 112, as follows:

" 'It will be conceded that when a stockholder in any corporation dies, his estate succeeds him in the title to, and the rights in, the stock he held. Of necessity, it must take that title and those rights subject to any liability then existing upon them; and so long as the estate is, by operation of law, the holder of such stock, the estate must become responsible for any obligations accruing during that time which the law may impose upon any holder of the stock as such. Such liability proceeds not from any new contract made by or on behalf of the estate, but it is inherent in the property itself. To avoid it the estate must part from the property; must cease to be the holder of the stock. Or, calling it a contract liability, it arises out of a contract made by the stockholder, and binding his personal representatives, as it bound him, as long as the relation of stockholder existed.' " (pp. 527-528.)

In further discussing the question this court also said:

"But the settled doctrine is that, as a general rule, the legal owner of stock of a national banking association—that is; the one in whose name stock stands on the books of the association—remains liable for an assessment so long as the stock is allowed to stand in his name on the books, and, consequently, that although the registered owner may have made a transfer to another person, unless it has been accompanied

by a transfer on the books of registry of the association, such registered owner remains liable. *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Webster v. Upton*, 91 U. S. 65; *Pullman v. Upton*, 96 U. S. 328; *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479; and *Richmond v. Irons*, 121 U. S. 27, 58. This principle thus settled as to the stockholders in national banks is in entire accord with the rule established by state courts in construing statutes containing substantially similar provisions." (p. 530)

(3) *The fact that assessment had not been levied at the time of distribution of assets of an estate (termed "allotments" in the case) does not prevent the contingent liability for assessment from constituting a debt or obligation of the estate, and a lien thereon within the meaning of the assessment statutes at the time of such distribution or allotment.*

In support of the foregoing this court said:

"It is argued, however, that as by law of Minnesota the liability to be called upon to pay a debt of the estate, to the extent of the distributive share received, depended solely upon whether there was such debt existing at the time the allotment was made, and as there was no such debt in the present instance, no duty to respond arose. This is predicated upon the assumption that because the insolvency happened after the allotment, therefore there was no debt at the time of the allotment. This assumes that whether there was a debt depended upon the date of the insolvency. In effect, this is but to argue that the estate was never liable at all. Such clearly is the essence of the proposition, for if it be that whether there was a debt is to be alone ascertained by the happening of insolvency and not by referring to the date of the subscription, then where insolvency occurred after the death of the stockholder, there would be no responsibility. The unsoundness of this view has been already demonstrated." (p. 529) * * *

"The contention is next made that conceding there was a debt of the estate, and granting that the statute embraced a preexisting contract obligation which had

not ripened into an actual demand because insolvency had not taken place, nevertheless the court below erred, because by the effect of the allotment the estate had ceased to exist and all its property had passed to the allottees. This but reiterates the misconception already disposed of." (p. 529)

(4) *The liability of the estate for the assessment being established under the foregoing rules, the Receiver can enforce such liability against the allottees or distributees under a state law making them liable for the debts of the estate to the extent of the assets received by them from the estate.*

In support of the foregoing this court said:

"It is clear that, by necessary implication, it was decided that by the statutes of Minnesota under which the allotment in indivision was made, the heirs or next of kin remained by operation of law, *to the extent to which they received the property of the estate,* subject to be sued and to respond to the debts of the estate existing at the time the allotment took place." (p. 528) (Italics inserted)

* * * * * * * * *

"Whether the effect of the allotment was to extinguish the estate, was wholly dependent on the Minnesota law. That law, as construed by the courts of Minnesota in this case, in substance provides (for the purpose of the enforcement of the debts of the estate then actually existing or resting in contract, and liable to arise from events to take place in the future) that the estate should, in legal effect, continue to exist, to the extent provided, for the purpose of enforcing the debts in question." (pp. 529, 530)

* * * * * * * * *

"As in the case now before us the stock remained on the books in the name of Matteson, continued as a liability of the estate and was never transferred under the allotment, it follows that the allottees have no right to complain because the receiver has availed himself of the provisions of the Minnesota statute." (p. 532)

Applying the foregoing principles to the instant case, it appears that the contingent assessment liability of Henry Forrest upon the six shares of stock survived his death and became a liability of, and a charge or lien upon, his estate; that inasmuch as said stock was permitted to stand upon the books of the bank in his name and so stood at the time the assessment was levied and the suit was filed, the estate of Henry Forrest continued to be responsible for the assessment and charged with a lien for its payment; that said liability and lien were not affected by the fact that the assessment had not been levied at the time of distribution of the assets in 1920. Hence considered (for the purpose of argument only), from the standpoint of the *state* law in conjunction with the *Federal* law, it follows that if the laws of Utah permit a creditor to pursue assets of the estate of a decedent into the hands of heirs and distributees and their grantees with notice, the court below, in line with Matteson v. Dent, was not in error in holding that the assets of the estate of Henry Forrest traceable to the defendant as such grantee with notice, were impressed with a lien based upon the assessment liability.

The discussion next following (under sub-paragraph (b) of this division, pp. 12 to 22) will discuss the Utah law in this connection. However, it is *also* the position of respondent, as will more fully hereinafter appear (sub-paragraph (c) of this division of the argument, p. 24 *infra*, and sub-paragraph II (b), *infra*, pp. 30 to 34), that the lien for the assessment liability having been created by Federal law, follows the assets to the heirs and distributees and grantees with notice *and may be enforced regardless of the provisions of state laws.*

(B) THE LAWS OF UTAH MAKE THE DEBTS AND OBLIGATIONS OF A DECEDENT A CHARGE OR LIEN UPON THE ASSETS OF HIS ESTATE, AND IN CONSEQUENCE PERMIT THE CREDITOR TO PURSUE THE ASSETS INTO THE HANDS OF THE HEIRS AND DISTRIBUTEES. HENCE, THE COURT BELOW WAS NOT IN ERROR IN HOLDING THAT THE ASSETS OF THE ESTATE OF HENRY FORREST TRACEABLE TO

THE DEFENDENT, AS A GRANTEE WITH NOTICE FROM A DISTRIBUTEE OF THE ESTATE, WERE IMPRESSED WITH A LIEN BASED UPON THE ASSESSMENT LIABILITY.

(1) *The Applicable Statutes of Utah making the Assets of the Estate of a Decedent liable or Chargeable for his Debts and Obligations.*

"Every person over the age of eighteen years of sound mind may by last will dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in chapter 4 of this title, being *chargeable in both cases* with the payment of all the decedent's debts as provided by law."
—R. S. U. 1933, Sec. 101-1-1; (C. L. 1917 Sec. 6311)

"When a person dies intestate, *all his property, real and personal,* without any distinction between them, *is chargeable* with the payment of his *debts,* except as otherwise provided by law."
—R. S. U. 1933, Sec. 101-3-2; (C. L. 1917 Sec. 6383)

"When any person having title to any estate, not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this title or in the probate code, *subject to the payment of his debts,* in the following manner:" * * *
—R. S. U. 1933, 101-4-5 (L. 25, p. 195, C. L. U. 1917, 408)

"The property of a testator, except as otherwise provided by law, must be resorted to for the payment of debts, expenses and family a owance in the following order:

(1) The property which is expressly appropriated by the will for the payment of the same.
(2) Property not disposed of by the will.
(3) Property which is devised or bequeathed to a residuary legatee.
(4) Property which is not specifically devised or bequeathed.
(5) *All other property ratably.*

Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for."

—R. S. U. 1933, 101-3-3 (C. L. 1917, 6384)

"If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established or absolute, must be paid into the court and there remain to be paid over to the party when he becomes entitled thereto, or if he fails to establish his claim, to be paid over or distributed as the circumstances of the case require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered."

—R. S. U. 1933, 102-9-26 (C. L. 1917, 7671)

It is obvious from the foregoing that the Statutes of Utah specifically provide that the assets of the estate of a decedent, whether disposed of by a will or under the distribution laws of the state, are chargeable with the payment of all of its debts. Being chargeable with such payment, it necessarily follows that the debts constitute a lien upon such assets. As will be more fully hereinafter indicated, these statutes are no more than a reiteration of the ancient rules of law prevailing even in the absence of statute under which the courts have always held that the assets of a decedent's estate are charged with liability for payment of his debts. In addition to this there is further the Federal statutory provision embodied in Section 5152 U. S. R. S. (U. S. Code, Title 12, Ch. 2, Sec. 66) that the assets of the estate of a decedent are chargeable with payment of assessment liability to the same extent as though the stockholder were living.

There are no Utah statutory provisions affirmatively providing for the pursuit by a creditor of the assets of a dece-

dent's estate into the hands of his heirs or distributees or legatees but there are statutes which provide for the adoption or acceptance of the common law and of equity as the rule of law to govern in Utah in the absence of statutory provisions upon a particular subject.

Section 5838 of the Compiled laws of Utah of 1917 provides:

> "The common law of England, so far as it is not repugnant to, or in conflict with the Constitution and laws of the United States, or the Constitution and laws of *this state, shall be the rule of decision in all the* courts of this state."
>
> (Carried forward to substantially the same effect in the Revised Statutes of Utah 1933, Sec. 88-2-1.)

Section 5839 Compiled Laws of Utah, 1917, provides:

> "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the revised statutes. The revised statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect the objects of the statutes and to promote justice. *Whenever there is any variance between the rules of equity and the rules of the common law, in reference to the same matter, the rules of equity shall prevail.*"
>
> (Carried forward substantially as Sec. 88-2-2 of the Revised Statutes of Utah, 1933.)

Article VIII, Sec. 19, of the State Constitution, provides:

> "There shall be but one form of civil action, and law and equity may be administered in the same action."

Assuming for present discussion that there are no Utah state statutes upon the question of pursuing assets into the hands of heirs or distributees, it follows in consequence of the foregoing that the ancient or established rules of law and equity which prevail in the absence of statute are de-

terminative in the State of Utah upon that subject, and that if such established non-statutory rules permit the pursuit of assets of the estate of a decedent into the hands of heirs or distributees or grantees with notice from such distributees or heirs, recovery of the amount of the assessment from the defendant herein is proper on the basis that he has received assets of the estate greater in value than the amount of the assessment and hence that he is properly accountable for the amount of the assessment.

(2) *The Established Non-statutory Rules of Law and Equity do Permit the Pursuit by a Creditor of the assets of the Estate of a Decedent into the hands of Heirs and Distributees and Grantees with Notice from such Heirs and Distributees for the Purpose of Satisfying the Claim of such Creditor.*

In support of the foregoing doctrine the following cases may be noted:

Borer v. Chapman, 119 U. S. 587, 599, 600.

This was a bill in equity filed by a creditor to reach assets of the estate of a decedent, after distribution to devisees and legatees had been made and the estate had been closed. It appeared that probate proceedings were had in Minnesota, and that inasmuch as the bulk of the property was located in California, ancillary proceedings were filed in California. In due time, after publication of notice to creditors in California, final distribution of the assets was made to the legatees. Suit was then filed in Minnesota to collect the proceeds of this distribution from the legatees, and their successors in interest, and to apply the same toward the payment of a judgment held by the plaintiff against the decedent. This court held that the assets could be followed into the hands of the distributees and their successors in interest and in that connection said:

"Such assets were impressed with a trust which such creditor had a right to have administered for his benefit. Aspden v. Nixon, 4 How. 467; Stacy v. Thrasher, 6 How. 44; Hill v. Tucker, 13 How. 458; Mackey v. Coxe, 18 How. 100. *It is upon the ground of such a trust that the jurisdiction of courts of equity primarily rests in administration suits, and in creditors' bills brought against executors or administrators, or after distribution against legatees, for the purpose of charging them with a liability to apply the assets of the decedent to the payments of his debts.* As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal courts, to be administered by the circuit courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States. Suydam v. Broadnax, 14 Pet. 67; Hagan v. Walker, 14 How. 28; Union Bank v. Jolly, 18 How. 504; Hyde v. Stone, 20 How. 170; Green v. Creighton, 23 How. 90; Payne v. Hook, 7 Wall. 425, 430.

"In Payne v. Hook, ubi supra, the rule was declared in these words: 'We have repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. If legal remedies are sometimes modified to suit the changes in the laws of the states and the practice of their courts, it is not so with equitable. The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union.'"

(Pgs. 599-600—Italics inserted.)

Board of Public Works v. Columbia College, 17 Wall. 521, 530:

This was a suit in equity by a creditor against heirs and legatees to reach property of the estate of a decedent, where the estate had been closed and part of the assets distributed to legatees, and part taken over by heirs, and to subject such assets to the payment of the debts of the plaintiff. It appeared that there were probate proceedings in which plaintiff might have filed his claim, but he negligently failed to do so. This court outlined the jurisdiction of equity to follow the assets of the estate of a decedent, even when the assets had been distributed and the estate had been closed, where timely application for relief was made by the creditor. The court denied relief in the case because it considered the creditor had been guilty of laches, but in stating the inherent jurisdiction of equity to pursue the assets of the estate, the court said:

> "The jurisdiction of a court of equity to reach the property of a debtor justly applicable to the payment of his debts, *even when there is no specific lien on the property,* is undoubted. It is a very ancient jurisdiction, but for its exercise the debt must be clear and undisputed and there must exist some special circumstances requiring the interposition of the court to obtain possession of and apply the property. *Unless the suit relate to the estate of a deceased person,* the debt must be established by some judicial proceeding, and it must generally be shown that legal means for its collection have been exhausted. In all cases, we believe property pledged or conveyed for the payment of the debt must be first applied.
>
> "The rule requiring the existence of special circumstances bringing the case under some recognized head of equity jurisdiction, should not only be insisted upon with rigor whenever the property sought to be reached constitutes, as here, *assets of a deceased debtor, which have already been subjected to administration and distribution;* but some satisfactory excuse should be given for the failure of the creditor to present his claim, in the mode prescribed by law, to the represen-

> tative of the estate, before distribution." (Pgs. 530, 531—Italics inserted.)

To the same effect see Continental National Bank v. Hielman, 81 Fed. 36, 42, 43, 44 (assets distributed and estate closed); Pyatt v. Waldo, et al., 85 Fed. 399, 400; Chewett v. Moran, 17 Fed. 820, 821, 822 (assets distributed and estate closed); Johnson v. Colbertson, 79 Fed. 5, 6 (assets distributed and estate closed); O'Neill v. Lauderdale, 195 Pac. 121, 124 (assets distributed and estate closed); Chitty v. Gillett, 148 Pac. 1048, 46 Okla. 724 (assets distributed and estate closed); Madison v. Buhl, 8 Pac. (2) 271, 272 (assets distributed and estate closed). Mortimer et al. vs. Potter, 72 N. E. 817, 818; 213 Ill. 178. Also see cases cited 18 C. J., par. 308, pg. 954, note 11.

(3) *Utah Decisions with Reference to Following Assets.*

There appears to be only one decided case in the State of Utah upon the foregoing question,—Bacon v. Thornton, 16 Utah 138, 144, 51 Pac. 153, 154. In that case the heirs of decedent had sued defendant for an accounting for certain minerals taken from a mine of the ancestor. Defendant filed counterclaim for the value of certain improvements to the property and to charge the heirs with liability for the amount of said improvements. The trial court entered personal judgment against the heirs for the amount of the improvements and the appellate court reversed the same and held that the heirs were liable, in principle, only to the extent of the assets of the estate received by them, and in that connection the Supreme Court of Utah said:

> "It is also insisted for the appellants that the court erred in rendering a personal judgment against the plaintiffs, and we are of the opinion that this point is well taken. That the administrator is not personally liable, under any circumstances indicated by the record, is too clear for argument; and there is no evidence to show that the heirs of the deceased received any assets from the estate, *except the interest in the mine*

> *in question. The heirs are not bound to pay the debts or discharge the obligations of the ancestor unless they have received property from his estate.* If they have received assets from the estate, then they are responsible *to the extent of their inheritance,* but beyond that they are liable neither in law nor in equity. If, then, a party seeks satisfaction for debts or obligations of the ancestor from the heirs, the burden is upon him to show that they inherited assets from the ancestor's estate. Cutright v. Stanford, 81 Ill. 240; Byrd v. Belding, 18 Ark., 118; Schmidtke v. Miller, 71 Tex. 103, 8 S. W. 638; Forman v. Stickney, 77 Ill. 575; Walker v. Deaver, 79 Mo. 664."
>
> (Pg. 154, Pacific Reporter—Italics inserted.)

The cases cited by the court (appearing in the above quotation) have been examined, and brief comment will be made concerning them: *Cutright et al. v. Stanford, et al.*, 81 Ill. 240, 244.

Here it was held, as to the liability of heirs of the creditor, based upon the general or non-statutory rule, that

> "The extent of their liability, both at law and in equity, is to the full amount which came to them by descent."

Forman v. Stickney, 77 Ill. 575, 578 (to the same effect).

Byrd's Administrator v. Belding's Heirs, 18 Ark. 118, 120 (to the same effect).

Schmidtke v. Miller, 71 Tex. 103, 107 (to the same effect).

Walker v. Deaver, 79 Mo. 664, 673, 679 (cited above) was a suit by a grantee against the heirs of a grantor of certain property for damages for breach of covenant of title. The estate of the grantor had been closed long prior to the filing of the suit. The liability sought to be enforced against the heirs was necessarily contingent originally, but became absolute by breach of the covenant. The court held that each of the heirs was liable in dam-

ages to the extent of his pro rata share of assets derived from the estate of the ancestor and in that connection said:

> (Pg. 673) "But in the case at bar, the estate for many years had been finally administered, and the assets all distributed. The cause of action did not accrue until long after administration was closed and distribution made. There is no pretence of the existence of any other creditor or liability. The only funds to be reached are assets received by the heirs. Under such circumstances and for such isolated object, why open the administration to go through the formulary of an allowance against the estate, not in the hands of the administrator, but in that of these defendants? Why have the administrator go after the heirs, and the plaintiffs after the administrator, with the accumulated costs and the inevitable delay? As satisfaction is ultimately to come from the heirs, why should they demand the circumlocution and burden of another administration? In a case situated like this the direful results, confusions and inequalities, suggested by the learned counsel for defendant, in permitting the plaintiffs to proceed directly against the heirs, are entirely fanciful. The maxim, *cessante causa, cessat effectus*, becomes, in such a case, a principle both of common sense and justice. State Savings Asso'n v. Kellogg, 52 Mo. 583."
>
> (Pg. 679) "VIII. Objection is taken to the judgment entered in this case, because it is against the distributee defendants in solido. This suit is against the defendants as the heirs and distributees of the covenantor. As such they are liable only to the extent of the assets received from the estate, respectively. Each heir is where, as in this case, there are several distributees, recovery can be had against each for his pro rata share of the assets received and no more."

It will be observed that in all of the foregoing cases cited by the Utah court in support of the point now in question, the heirs or distributees or legatees were held liable to the creditor of the estate of the decedent in reliance upon the general or non-statutory doctrines of law and equity that

the assets of the estate of a decedent are charged with liability for the payment of his debts and that the same may be followed into the hands of the heirs, distributees, etc., and that they are responsible by way of a judgment to the extent of the assets received by them from the estate. This would seem to demonstrate clearly that the Utah court, in citing the foregoing cases to support its conclusion, recognized that the general rule above referred to in Borer v. Chapman, *supra*, Board of Public Works v. Columbia College, *supra*, and the other cases above cited, constituted the law in Utah. Such being the case it would seem clear, following Matteson v. Dent, establishing the basis of liability, and following the Utah law permitting pursuit of the assets of the estate of a decedent into the hands of heirs or distributees, the defendant in the present case, being a grantee with notice from a distributee or legatee of the estate of Henry Forrest, took the property charged with a lien for the stock assessment, and should be held accountable in the form of a personal judgment for the amount of the stock assessment in view of the fact that he received assets greater in value than the amount of such assessment.

(4) *The Defendant, as a Grantee with Notice, Acquired no Greater Title than his Grantor.*

The defendant had actual knowledge of the fact that he, as administrator, had not performed his duty of having the stock transferred upon the books of the bank to a competent holder, and consequently he is charged with constructive notice, at least, of the further fact that under the law the estate remained responsible for the contingent or inchoate liability for assessment. Consequently, regardless of whether he actually did pay consideration for the property so received, he is clearly not in the position of a bona fide purchaser for value *without notice*, and it would seem to require no citation of authorities to support the

conclusion that he took no greater title than his grantor possessed and hence took it charged with liability and a consequent lien for the assessment.

The suggestion of petitioner (page 4 of petition and page 9 of supplemental brief) that to impress a lien upon the property is to countenance "secret liens" has no application to the instant case, inasmuch as petitioner acquired title with notice. Incidentally, it may be doubted whether there may be a bona fide purchaser for value without notice of property of an estate of a decedent where the record shows, or investigation from the record will show, outstanding liabilities of the estate not satisfied, released nor eliminated. It may also be noted that the deeds to the property in question contained the recital that the grantee received said property as the heir of the testator (R. p. 37), and while this does, literally, involve an anomalous use of terms, it apparently was intended to indicate that the defendant as grantee was in reality receiving property which, under the terms of the will, would ultimately have come to him as remainderman after the death of his mother. In fact the whole transaction in this connection seems reasonably susceptible of the fair inference that the conveyance was intended to anticipate and accelerate, by agreement of the parties, the acquisition by the defendant of the property which ultimately would have been received by him as remainderman. Of course, as remainderman, he would have been chargeable or accountable for the property to the extent required to meet the assessment liability.

(5) *Application of the Foregoing Principle of Estate Liability, to Stock Assessment Obligation.*

Assuming that it has been satisfactorily developed from the preceding discussion that under the Utah law the assets of an estate may be followed into the hands of a distributee or heir or a grantee therefrom with notice, and the case of Matteson v. Dent having established that this principle

may be applied to national bank stock assessment liability, no further citations would appear to be necessary in that connection. An examination of the subsequent history of Matteson v. Dent through the citators and otherwise does not indicate that the case has been overruled or differentiated (except in the dissenting opinion of the court below) in any of the subsequent decisions in which it has been cited. Attention may be directed, by way of cumulative authority, to the following assessment cases: Luce v. Thompson, 36 Fed. (2) 183, 185, 186; Zimmerman v. Carpenter, 84 Fed. 747 (see discussion of this case, *infra*, pg. 33); Mann vs. Kleisdorff, 16 F. (2) 997; Rankin v. Miller, 207 Fed. 602; Gilbertson v. McCarthy, 32 F. (2) 665; Rankin v. City of Big Rapids, 133 Fed. 670; Rankin v. Herrod, 140 Fed. 661. Also see the following State cases: Gift v. Love, 144 So. 562, 567 (where the estate had been fully administered and closed); Carlisle v. Love, 155 So. 197, 203 (where the estate had been fully administered and closed); Mortimer et al. v. Potter, 72 N. E. 817, 818; 213 Ill. 178.

(c) THE FEDERAL STATUTES CREATE THE ASSESSMENT LIABILITY AND MAKE THE SAME A CHARGE OR LIEN UPON THE ASSETS OF THE ESTATE OF A DECEDENT. HENCE, REGARDLESS OF STATE LAWS, SUCH LIEN FOLLOWS THE ASSETS INTO THE HANDS OF HEIRS AND DISTRIBUTEES AND ACCORDINGLY THE COURT BELOW WAS NOT IN ERROR IN HOLDING THAT THE ASSETS OF THE ESTATE OF HENRY FORREST TRACEABLE TO THE DEFENDANT AS A GRANTEE WITH NOTICE FROM A DISTRIBUTEE OF THE ESTATE WERE IMPRESSED WITH A LIEN BASED UPON THE ASSESSMENT LIABILITY.

Discussion under this topic will be found as part of subparagraph II (b), *infra*, pp. 30 to 34.

II. The "non-claim" statutes of Utah are no bar to the assertion of the assessment liability against the estate, and hence do not preclude the pursuit of said assets into the hands of the defendant under the doctrines established in Matteson v. Dent, supra, for the reasons that:

(A) CONTINGENT CLAIMS, SUCH AS THE ASSESSMENT CLAIM IN QUESTION, ARE NOT WITHIN THE PURPOSE OF THE "NON-CLAIM" STATUTES OF UTAH AND HENCE ARE NOT EXCLUDED FROM ASSERTION AGAINST THE ESTATE.

Utah non-claim statutes:

Revised Statutes of Utah 1933 (C. L. U. 1917, Sec. 7648). Sec. 102-9-4:

> "All claims arising upon contract, whether the same are due, not due, or contingent, must be presented within the time limited in the notice, and any claim not presented is barred forever; provided, that when it is made to appear by the affidavit of the claimant, to the satisfaction of the court or judge thereof, that the claimant had no notice as provided in this chapter, by reason of being out of the state, it may be presented at any time before a decree of distribution is entered; provided further, that nothing in this title contained shall be so construed as to prohibit the foreclosure of liens or mortgages as hereinafter provided."

Revised Statutes of Utah 1933 (C. L. U. 1917, Sec. 7673), Sec. 102-9-28:

> "When the accounts of the administrator or executor have been settled and an order made for the payment of debts and distribution of the estate, no creditor whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees or legatees, to contribute to the payment of his claim; but if the executor or administrator has failed to give due notice to the creditors, any such creditor may recover on the bond of the executor or administrator."

The second of the statutes above quoted (sec. 102-9-28) was obviously intended to be complementary of the first (Sec. 102-9-4). The first provides that claims of the type therein specified not presented as required shall be "barred forever" and it necessarily follows that if such claims are

forever barred they cannot thereafter be asserted either against the estate or against the creditors, heirs, devisees or legatees, and hence the second statute is merely a reiteration of what the law would be in the absence of its enactment. It further follows that if it be determined that the first statute is inoperative against the assessment liability now in question, the second statute is not operative to preclude recourse to the heirs, devisees or legatees or their grantees with notice.

It seems clear on principle that contingent claims, such as the assessment liability in question, claims growing out of covenants, warranties, guaranty contracts, and similar claims reaching into the future, wherein the liability is not only contingent but also is, from its very nature, incapable of being presented and allowed in the probate proceedings due to the fact that the liability has not become absolute and may never culminate into absolute liability, cannot reasonably be considered to be within the scope and purpose of such statutes. The courts have uniformly so held and some of the cases to that effect will here be noted.

Hantzch v. Masselt, 63 N. W. 1069, 1070, 1071, 1072, 61 Minn. 361—.

In this case the plaintiff obtained judgment against his guardian on March 3, 1894, for funds due him for which proper accounting had not been rendered. The two sureties of the guardian had died, and after due publication their estates had been finally distributed prior to the rendition of the above mentioned judgment against the guardian. The plaintiff sought to follow the assets of the estates of the sureties and recover from the legatees and distributees to the extent of the assets received from the estates insofar as necessary to satisfy the foregoing judgment. The legatees and distributees contended that the claim of the plaintiff was barred, and the assets could not be followed into their hands, because the claim had not been presented as required by the Minnesota statute. The limitation provisions of the statute are almost identical with Sec. 102-9-4 of

the Utah statute above quoted. The Minnesota court held that the contingent claim, not being capable of proof in the probate proceedings, was not intended to be within the scope of the limitations statute and hence the plaintiff could pursue the assets into the hands of the legatees and distributees. In that connection the court said:

> "The plaintiff's claim did not become absolute and liquidated until long after the time for presenting claims against the estates of the deceased sureties, or either of them, had expired, and the estates settled and distributed to the defendants, as heirs and devisees. Is this action then barred because the plaintiff did not present the claim to the probate court for allowance?
>
> "The answer involves a construction of sections 104, 107, and 110 of the Probate Code (chapter 46, Laws 1889; sections 4511, 4514, 4517, Gen. St. 1894), which read as follows:
>
> " 'Sec. 104. All claims arising upon contracts, whether the same be due, not due, or contingent, must be presented to the probate court within the time limited in said order, and any claim not so presented is barred forever; such claim or demand may be pleaded as an offset or counterclaim to an action brought by the executor or administrator. All claims shall be itemized, and verified by the claimant, his agent or attorney, stating the amount due, that the same is just and true, that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of affiant. If the claim be not due, or be contingent, when presented, the particulars of such claim must be stated. The probate court may require satisfactory vouchers or proofs to be produced in support of any claim.'
>
> " 'Sec. 107. No action at law for the recovery of money only shall be brought in any of the courts of this state against any executor, administrator or guardian upon any claim or demand which may be presented to the probate court except as provided in this Code. No claim against a decedent shall be a charge against or lien upon his estate unless presented to the probate court as herein provided within five (5) years after

the death of such decedent: provided, that this provision shall not be construed as affecting any lien existing at the date of such death; *provided further, that said provision shall not be construed as affecting the right of a creditor to recover from the next kin, legatee or devisee to the extent of assets received.* * * *,'"
(pp. 1070, 1071, Reporter Citation—Italics inserted.)

* * * * * * * * *

"If section 104 is construed literally, it would include, not only the plaintiff's claim, but all claims of every kind arising upon contract. Its language is 'all' claims arising upon contracts, whether the same be due, not due, or contingent. These three classes include all possible claims growing out of contracts. If there are no implied exceptions in this statute as to any class of contingent claims, *then, if a person dies who was a stockholder in a corporation,* or had conveyed lands by a warranty deed, or signed official bonds as a surety, or given leases for a term of years, with covenants to indemnify the lessee against damages by water from the pipes on the demised premises, creditors, obligees, and covenantees who would not be forever barred of all right to any redress against his property must hasten to the probate court, and prove their claims, within the 18 months from the giving notice of the order limiting the time to press its claims against the estate. How can they be proved? Counsel for respondent answers: 'State the particulars of the claim under the provisions of section 104.' But, until a contingent claim becomes absolute, the amount thereof cannot be liquidated, so that it can be allowed by the court, and the amount thereof stated in the order allowing it, as required by section 110." (p 1071, Reporter Citation—Italics inserted.)

* * * * * * * * *

"Section 104 must be given a reasonable, and not a literal, construction, which, as we have seen, would lead to absurd and unjust results. Clearly, it was not the intention to bar claims for the payment of which no possible provision was or could be made, nor to repeal as to claims arising on contracts. Gen. St. 1878, c. 77, secs. 7-14, inclusive (Gen. St. 1894, secs. 5918-5925)."
(p. 1072, Reporter Citation.)

It is true that section 107 of the Minnesota statute contains a proviso that the restrictive or limitation provisions therein referred to "shall not be construed as affecting the right of a creditor to recover from the next of kin, legatees or devisees to the extent of the assets received." *This proviso, however, does not create a new right, but merely reiterates what would necessarily be the law in the absence of the provision.* That such provision does not create a new right is indicated by the state court decision in Dent v. Matteson, et al., 73 N. W. 416, 70 Minn. 519, wherein it was said (p. 417 of the Reporter edition): "It seems to us that Section 5152 is merely declaratory of what the courts would have held without the aid of that section * * *". The fundamental laws relating to estates, referred to in Borer v. Chapman, *supra,* Board of Public Works v. Columbia College, *supra;* and the cases of similar type hereinbefore cited, charging heirs, distributees and legatees with liability for the debts of the estate to the extent of the assets received, preclude any construction or conclusion barring the claim of a contingent creditor who has never had an opportunity under the law to present and enforce his claim. In Leavenworth Savings & Trust Co. v. Newman, 23 Fed. (2) 835, 837, the Circuit Court of Appeals for the Eighth Circuit, in discussing this subject, with reference to "non-claim" statutes, said:

> "(2) Further, in so far as recovery is sought against the heirs of J. F. Drais, who have received distributive shares of his estate, the cause of action arises by virtue of the provisions of the statutes of Missouri which make the descent of both real and personal property subject to the debts of the ancestor. Rev. St. Mo. 1919, sec. 303, 2270; Higbee v. Billick, 244 Mo. 411, 424, 148 S. W. 879; City of Springfield v. Clement, 205 Mo. App. 114, 123, 225 S. W. 120; Rogers v. Johnson, 125 Mo. 202, 216, 28 S. W. 635. Similar statutes exist in many of the states. Under these statutes it is generally held that the heirs and distributees may be proceeded against directly, where the cause of action did

not arise or accrue, so as to become provable and enforceable, until after the administration of the estate had been closed. * * *"

To the same effect see:

Luce vs. Thompson, 36 F. (2) 183, 184
Rankin v. City of Big Rapids, 133 F. 670, 680, 681.
Rankin v. Herod, 140 F. 661, 664.
Payson v. Hadduck, et al., 19 Fed. Cas. 23, 25, 26, Case No. 10862 (D. C. Ill. 1878)
Davis v. Weed, 7 Fed. Cas. 186, 187, 188, 189, 190, Case No. 3658 (C. C. Conn. 1877).
State v. Tittman, 134 Mo. 162, 35 S. W. 579, 580.
Logan v. Dimon (*Wis.*), 41 N. W. 713, 714, 715, 716.
Mann v. Everts, 64 Wis. 372; 25 N. W. 209.

(b) THE ASSESSMENT LIABILITY IS CREATED BY FEDERAL STATUTE, IS MADE A LIEN UPON THE ESTATE BY FEDERAL STATUTE, AND, ASSUMING, FOR DISCUSSION ONLY, THAT THE ASSESSMENT CLAIM IS WITHIN THE SCOPE OF THE STATE "NON-CLAIM" STATUTES, THE STATE STATUTES CANNOT PREVAIL OVER THE OPERATIVE EFFECT OF THE FEDERAL STATUTE WHERE RELIEF IS BEING SOUGHT IN THE FEDERAL COURT.

The general doctrine is thoroughly settled that the national banking laws are a system complete within itself, covering the organization, supervision, and liquidation of national banks, and that the laws of the states will not be permitted to impinge upon or interfere with the operative effect of the Federal provisions.

Cook County National Bank v. United States, 107 U. S. 445, 448;
California Bank v. Kennedy, 167 U. S. 362, 366;
Davis v. Elmira Savings Bank, 161 U. S. 275;
Easton v. Iowa, 188 U. S. 220;
Texas & Pacific Railroad v. Pottorff, 291 U. S. 245, 253;
First National Bank v. Missouri, 263 U. S. 640.

It follows from the foregoing that where, as in the instant case, the Federal law has provided incident to the liquidation of national banks, not only for assessment lia-

bility (secs. 64, 65, ch. 2, Title 12, United States Code), but in effect that such assessment liability, even though contingent or inchoate, shall constitute a lien upon the assets of the estate (sec. 66, ch. 2, Title 12, United States Code; Matteson v. Dent, *supra*), no state law can defeat the enforcement of the lien and pursuit of the assets based upon the established doctrines applicable to estates and available in the Federal courts. In this connection may be noted the following:

Borer v. Chapman, 119 U. S. 587, 600 (*referring to the jurisdiction of equity to pursue assets to satisfy debts of a decedent*):

> "As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal courts, to be administered by the Circuit courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their own courts, and cannot be affected by any legislation except that of the United States." (p. 600)

Continental National Bank v. Heilman, 81 Fed. 36, 44:

> "These cases settle the doctrine that the statute of a state prescribing the time within which a suit must be brought against heirs to charge them with an ancestral debt cannot be invoked for their protection in the national courts." (p. 44)

Mortimer, et al. v. Potter, 72 N. E. 817, 818; 213 Ill. 178:

In this case, Charles Kavanagh, the stockholder of a national bank, died, and the assets of his estate had been delivered to trustees under a trust created under the will and the decedent's estate had been settled more than twenty years before the assessment was levied. The stock apparently remained of record in the name of decedent and checks for dividends were made payable to Charles Kavanagh and were endorsed by the widow as co-trustee under

the trust. The receiver sued the surviving trustee, as trustee (the widow having died), and the distributees receiving the assets of the estate, and also the surviving trustee personally. The court affirmed the judgment of the lower court rendering judgment to take effect primarily against the surviving trustee, secondarily against the legatees and distributees, and ultimately against the trustee personally, for the assets of the estate to the extent necessary to meet the assessment. The defense raised the point, inter alia, that the claim was barred because not presented within two years as required by state law. In overruling this contention and holding that the state statute was ineffective against the Federal statutes, the court said (p. 818, Reporter Citation):

> "It is next insisted by appellants that, even though this claim is valid against the estate, yet it cannot be enforced because it is barred by the statute of limitations, not having been presented for probate against the estate of Kavanagh within two years after the granting of testamentary letters. The claim against his estate is not by virtue of the laws of this state, but under the provisions of the foregoing federal statute. In addition to this, at the time the administration of his estate was closed the claim had not accrued. The liability arose more than 20 years after the expiration of the 2 years within which claims could have been filed against it in the probate court. But the remedy under the act of Congress is applicable, *and the estate is liable under its provisions, so long as the assets can be reached.* The case of Zimmerman v. Carpenter (C. C.), 84 Fed. 750, involved this same question. It was there claimed that a plea of the statute of limitations, based upon the statute of the state of South Dakota regulating the time in which claims should be presented for allowance or rejection against the estate, barred the claim there presented. In considering the question the court said: 'Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of the deceased, to be represented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever

> barred by the statute, involves a total misconception of the object, meaning, and effect of sections 5151 and 5152 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3465). Congress provided by these sections that the estate of the testator in the hands of an executor should be liable in like manner and to the same extent as the testator would be if living and competent to act and hold the stock. By the language of section 5152 the death of the testator does not in any way affect the liability of the estate, except, if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged.' Under the facts in this case the liability attached while the assets were in the hands of the trustee, and therefore came directly under the provisions of section 5152, *supra*." (Italics inserted)

The case of Zimmerman v. Carpenter, 84 Fed. 750, quoted in the foregoing extract from the opinion, contains the statement: "if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged." An examination of the Carpenter case indicates that inasmuch as the assets had *not* been distributed, the foregoing observation of the court is *obiter dictum* and may be disregarded. It is clearly not sound as a matter of law, inasmuch as it is contrary to the cases holding that the assets may be followed to the hands of heirs, devisees, and distributees by virtue of the lien upon said assets for the payment of the debts of the decedent.

For additional cases to the effect that state laws cannot affect the operation of the Federal statutes in this connection, see:

> *Payne v. Hook*, 7 Wall. 425, 430.
> *Chewett v. Moran*, 17 Fed. 820.

It is obvious that if non-claim statutes of a state are to be permitted to bar the enforcement of the assessment liability against heirs, legatees, distributees and their grantees with notice, where the Federal law has expressly imposed a

lien upon the estates of decedents, and with reference to which lien and liability all purchasers of national bank stock must take notice, the purposes of the National Banking Act designed to protect the creditors of the bank in the event of insolvency will be defeated, and the ancient doctrines of equity concerning the settlement of estates and available in the Federal courts for the enforcement of the national banking laws, where appropriate, would be rendered nugatory. As indicated, such construction is entirely contrary to the decided cases. To the effect that sec. 66 does impose a lien upon the assets of the estates therein mentioned see:

Gilbertson v. McCarthy, 32 Fed. (2) 665, 667, 668; Luce v. Thompson, 36 Fed. (2) 183, 184, 185; Rankin v. Miller, 207 Fed. 602, 613, 614, 616; Miller v. Hamner, 269 Fed. 891, 894; Rankin v. City of Big Rapids, 133 Fed. 670, 680, 681; Rankin v. Herod, 140 Fed. 661; Drain v. Stough, 61 Fed. (2) 668, 669.

For cases specifically to the effect that the Federal decisions and the principles of law thereby established, must be followed in construing the national banking laws, see:

Davis v. Elmira Savings Bank, 161 U. S. 275; Easton v. Iowa, 188 U. S. 220; First National Bank v. Selden, 120 Fed. 212, 215; Farmers & Mechanic's Natl. Bank vs. Dearing, 91 U. S. 29; Prigg vs. Pennsylvania, 16 Peters 539, 617-619; First Natl. Bank of San Jose vs. California, 262 U. S. 366.

III. The Court below committed no error in holding (a) that the trial court should have granted the plaintiff's motion to transfer the cause to the equity side to impress a lien for the assessment liability upon the assets acquired by the defendant from the estate, and (b) that notwithstanding the failure of the trial court to transfer the cause to the equity side, the court below had the power to make the transfer and consider the case as in equity and dispose of it on the record as presented upon reaching the conclusion that it had been fully heard in the trial court and that there was no occasion for a retrial.

Numbered paragraph 15 of the second amended complaint of respondent (R. p. 7) alleges not only that defendant, by reason of his wrongful acts and conduct, and by reason of receiving and accepting the described property belonging to the estate of Henry Forrest without consideration, became liable to the plaintiff for the amount of the stockholders' assessment, but also that

> "the above described property so received and now held by defendant as aforesaid is, and at all times hereinafter mentioned has been, subject to a lien in favor of the plaintiff for the payment of the amount of said assessment, to wit, $600, together with interest thereon at 8 per cent per annum from 15 April 1932, until paid."

It is therefore clear that notwithstanding the fact that the case was filed on the law side of the court, plaintiff laid the foundation for equitable relief in the foregoing allegations, preceded as they were by the facts and circumstances set forth just as fully as though the complaint had been drawn with reference to the equity side. The fact that in his prayer (R. p. 7) plaintiff prayed for judgment against the defendant for the sum of $600 and interest, is not necessarily inconsistent with relief in equity, in that under the theory of plaintiff's case, and in accordance with the established right to follow assets into the hands of distributees, legatees, etc., such distributees and legatees are accountable for the proceeds of the assets and judgment may be rendered against them accordingly. Jury trial was waived by stipulation (R. pp. 15, 16) and hence in that respect the case took on the aspects of a hearing in equity. Defendant, in his answer to the aforesaid numbered paragraph 15 of the complaint denied "each and every allegation thereof" (R. p. 11) and hence put in issue the question of equitable lien, thereby again importing equitable defense into the case. Testimony was taken fully upon the issues

raised, and at the conclusion of the case the plaintiff moved for judgment at law, and in the alternative moved that

> "in case the court rules against plaintiff's contention as to the liability of the defendant in a law action, that the case be transferred to the equity side of the court, and that a decree be entered in favor of the plaintiff impressing the property described in plaintiff's second amended complaint with a lien for the payment of the stockholders' liability referred to in said complaint." (R. p. 24)

Thereupon defendant moved for judgment in his favor on the grounds that the complaint did not state facts sufficient to constitute "*any* cause of action" against the defendant, and that "the evidence in the case is insufficient to sustain any action at law *or any relief whatsoever* on behalf of the plaintiff as against the defendant, * * *". (R. p. 24.)

It is clear from the foregoing that plaintiff submitted the matter to the court not only from the standpoint of a law action, but also on the theory of relief in equity. While it is true that plaintiff might have made two motions, one for relief at law, and upon that being denied, followed it with a motion to transfer the case to the equity side and for judgment in equity, the same result was in substance accomplished by combining the two motions in one, with the equity relief being put in the alternative. The defendant in effect waived any question concerning this procedure in that by his motion he contended that the complaint did not state facts to constitute "any cause" of action (which would be broad enough to cover relief both at law and equity) and also contended that the *evidence* was insufficient not only to sustain any action at law, but "*any relief whatsoever*" on behalf of plaintiff as against defendant.

Consequently, when defendant made this motion, he must be taken to have intended it to meet and overcome plaintiff's contention for alternative relief in equity in the event

the trial court decided to treat the case as transferred to the equity side. As stated in Clifton Manufacturing Company v. United States, 3 Fed. Supp. 508:

> (Pg. 513) "It must be remembered that the remedial provisions of the statute should be liberally construed, both to prevent the unnecessary prolonging of litigation and to prevent the dismissal of causes upon too technical grounds.
>
> * * * * * * * * *
>
> (Pg. 514) "The old practice of having separate judges for the courts of law and chancellors presiding over courts of equity has long since been abandoned in most jurisdictions, and now, particularly in the District Courts, the same judge acts in both capacities. * * *"

In the light of the foregoing and of the cases and authorities next cited, it seems clear that the trial court should have transferred the case to the equity side, but that notwithstanding the failure of the trial court to do so, the appellate court (the court below) had the right to transfer the case to the equity side, and having done so, could consider it as a suit in equity and if the conclusion was reached that the case had been fully heard in the trial below, could dispose of it upon the record without sending it back for retrial. See Irons v. Smith, 62 Fed. (2) 644, 647 (and cases therein cited); Twist et al. v. Prairie Oil and Gas Co., 274 U. S. 684, 689; Liberty Oil Company v. Bank, 260 U. S. 235, 241-244; Clarksburg Trust Company v. Commercial Surety Company, 40 Fed. (2) 626, 633, 644; National Surety Co. v. County Board, 15 Fed. (2) 993, 994; Fiorito, et al. v. Clyde Equipment Co., 2 Fed. (2) 807, 808.

Petitioner says (page 3, Supplemental Bill of Complaint) that respondents' suit, insofar as it attempts to impress a lien upon the property in question, is fatally defective in that it does not appear "that all parties actually interested in such title were before the trial court". In response, it may be stated that the record shows (page 36) that title to the real estate sought to be impressed with a lien was acquired by petitioner in his personal or individual

capacity, from his mother as distributee, and stands in his own name individually and not as administrator. The record does not show anyone else having an interest in said property and petitioner does not point out anyone else having an interest therein. The fact that petitioner's sister (R. pp. 35, 36, 37) also has title to certain other parcels received from the estate, has no relevancy to the instant case, inasmuch as no attempt is now being made to subject the property held by her to the payment of the assessment. Respondent can obviously proceed against such parcels of land charged with the assessment lien as he sees fit, and in the order he sees fit. If petitioner is required to pay more than his pro rata share of the assessment from the proceeds of the property derived from the estate and held by him, he has his right of contribution from the holders of the other assets of the estate upon which the lien may also apply. See: *First National Bank v. First National Bank*, 14 F. (2) 129.

There was no occasion to join petitioner as administrator, inasmuch as (a) he is no longer administrator and has distributed the assets of the estate; (b) title to the property is in his name individually and not as administrator; and (c) he is accountable personally for the proceeds of the assets of the estate held by him individually to the extent necessary to meet the assessment; (d) such joinder involves reopening the administration proceedings. Equity demands no such circuity of action. *Luce v. Thompson*, 36 F. (2d) 183, 185.

Hence, there was no defect or non-joinder of parties.

Defendant has had his day in court, has presented his case fully, and he does not suggest in what respects he was deprived of any of his rights, either as a matter of procedure or of producing evidence to support his case. At any rate, he joined issue in the trial court upon the questions of equitable relief presented and produced evidence to meet the same, and he cannot now be heard to complain.

IV. The defendant may also be held liable to the receiver on the theory of devastavit, for the reason that, having permitted the estate to remain liable for the assessment by not causing the stock to be transferred upon the books of the bank to his mother, the legatee, or to some other competent person, and such liability still being in existence at the time he made the distribution of the assets of the estate as administrator, he thereupon became guilty of illegal dissipation of assets in that he did not take appropriate means either to provide for the outstanding contingent assessment liability or to eliminate and remove such assessment liability from the estate by a proper transfer of the stock upon the books of the bank from the name of the decedent.

Under the circumstances, it is immaterial whether the defendant be held liable on the theory found by the court below by way of impressing a lien upon the assets with a corresponding accountability by way of personal judgment for such assets to the extent necessary to satisfy the assessment, or whether defendant be held personally liable to the amount of the assessment on the theory of devastavit. The ultimate result in either event is the same, and this court may properly find an additional basis for liability of the defendant without necessarily effecting the legality of the judgment of the court below. See Aberly et al. vs. Craven Co., 70 F. (2) 52, 54.

It is of course recognized that the question of liability of the defendant on the theory of devastavit is not *necessarily* before this court for consideration, in view of the fact that the court below bottomed its decision upon the equitable lien theory and the consequent pursuit of the assets to the defendant as grantee of the distributee and expressly held that defendant was not liable for devastavit for the reason that he had made the distribution in accordance with the decree of the state probate court. Hence, it appears that this court may eliminate consideration of the devastavit theory under the doctrine of Federal Trade Commission v. Pacific States Paper Trade Association, 273

U. S. 52, 66. On the other hand, this court may, if it sees fit, review the whole case and consider the question of devastavit in accordance with Cole, et al. v. Ralph, 252 U. S. 286, 290.

For the reasons stated in the headnote, (*supra*, p. 39) we believe that defendant is guilty of devastavit and in that connection cite:

Luce v. Thompson, (C. C. A. 8, 1929) 36 Fed. (2d) 183, 186;
Gilbertson v. McCarthy, (C. C. A. 8, 1929) 32 Fed. (2d) 665, 668;
Rankin v. Miller, (D. C.) 207 Fed. 602, 613, 614, 615, 616;
Miller v. Hamner, (C. C. A. 3) 269 Fed. 891, 895.

V. Additional points raised by petitioner—Respondent's reply to same.

Petitioner has raised several other points which will be answered here so as to avoid breaking the continuity of the discussion heretofore developed:

(a) Petitioner states (page 5 of petition) that the decision of the court below is in conflict with Hodges v. Meriweather, 55 Fed. (2) 29, 31, where it was held that no lien attached to the estate of the decedent. An examination of that case indicates clearly, however, that the distributee accepted the bank's stock in question and had it transferred to her in her name on the books of the bank and thereafter transferred it to her daughter, which transfer was likewise registered on the books of the bank, a considerable period before the failure of the bank. Obviously, under such circumstances, there was no basis for holding the assets of the estate of the decedent, inasmuch as the ownership had been succeeded to in due course by a competent transferee. The court clearly points out this distinction and differentiates the case from that of Luce v. Thompson, 36 Fed. (2)

183, in which latter case as in the instant case, the estate was held liable.

(b) Petitioner also states (page 5 of petition) that the decision of the court below is in conflict with Zimmerman v. Carpenter, 84 Fed. 747. This contention has already been refuted, *supra*, page 33.

(c) Petitioner further contends (pages 5 of petition and 7 of supplemental brief) that the language there quoted from Matteson v. Dent, 176 U. S. 529, 530,—"Whether the effect of the allotment was to extinguish the estate was wholly dependent on Minnesota law,"—supports his contention that the estate of the decedent in the instant case was wholly extinguished under Utah law and that the assets could not be pursued. In response it may be stated that the previous discussion has clearly indicated (*supra*, pp. 12 to 22) that the Utah law, like the Minnesota law, permits the assets of the estate of a decedent to be pursued into the hands of the heirs and distributees. An examination of the state court decision, Dent v. Matteson, 73 N. W. 416, 417, discloses that the right thus asserted under the Minnesota Law and under Title 12 chp. 2, section 66, U. S. C., is no different or greater than would be available in the absence of statute. It has also been pointed out (*supra*, pp. 30 to 34) that, regardless of the state law, the property upon which a lien has been impressed by the Federal assessment statutes may be followed into the hands of the heirs and distributees.

(d) Petitioner contends (page 5 of supplemental brief) that no lien could attach to the assets while they were in the custody of the state probate court, and quotes in that connection from the dissenting opinion below. In response it may be stated that the previous discussion has demonstrated that the assessment liability was contingent while Henry Forrest was alive but that upon his death it sur-

vived, and immediately, by operation of law, became a lien upon his assets. The probate court necessarily thereafter took custody of the assets subject to such lien, just as it would take assets subject to an existing mortgage or subject to the lien of other debts of the estate. The suggestion in the quoted extract from the dissenting opinion that the only remedy afforded by a court to enforce an assessment under said section 66 of the United States code "is to allow the claim and provide that it be satisfied out of the property in the hands of the administrator" is clearly untenable in light of the discussion (*supra*, pp. 24 to 30) relating to non-claims statutes to the effect that such statutes do not contemplate proof of such claims and in light also of the discussion to which reference has several times been made that the state statute cannot prevent the operative effect of the lien created by Federal statute.

(e) Petitioner also contends (Petition, pp. 9 and 10) in line with the position taken in the dissenting opinion (R. p. 54) that the cases cited on page 10 of the petition in effect overrule Matteson v. Dent and hold that assessment liability is statutory and not contractual, from which it is argued that the liability does not come into existence until the assessment is levied by the comptroller, and consequently the assessment liability, under these later decisions, cannot be considered to have related back to the estate of Henry Forrest as of the time same was being administered. In answer thereto it may be noted that the cases there cited either considered the nature of the liability from the standpoint of the period within which a receiver must bring an action to enforce assessment under state statutes of limitation after the assessment is levied and the cause of action thereon has become available as a matter of court procedure to collect the assessment, or considered other aspects of the liability not pertinent to the issues here involved. We submit that it is entirely immaterial whether the assessment liability be considered wholly statutory,

wholly contractual, or a combination of both factors. Whichever view be adopted, it cannot be doubted that the liability is contingent, and as such is contemporaneous and coexistent with ownership of the stock, and is subject to ultimate enforcement and collection when the assessment is actually levied. The formal act of levy of the assessment is functional only to the extent that it matures and makes absolute the *pre-existing* unmatured and contingent liability. Hence from this standpoint, the reasoning in Matteson v. Dent to the effect that a contingent liability is a debt or obligation of the estate even though the assessment has not been levied, must still be controlling as a matter of principle. Incidentally, with reference to the cited cases above referred to, it may be noted that: *McDonald v. Thompson,* 184 U. S. 71, 74. This Court said:

> "The statute was the origin (of) both of the right and the remedy, but the contract was the origin of the *personal responsibility* of the defendant."

McClaine v. Rankin, 197 U. S. 154, 162, states that "the liability has been held to be in its nature contractual, yet it is nevertheless conditional, and enforcible only according to the Federal statutes * * *." *Christopher v. Norvell,* 201 U. S. 216, 228, states: "But that implied obligation, although *contractual in its nature,* could not, standing alone, be made the basis of this action. Without the statute she could not be made liable individually for the debts of the bank at all." (Italics inserted)

Attention may also be directed to the following cases:

Bernheimer v. Converse, 206 U. S. 516.

This Court, in considering a state statute similar to the Federal statute, providing for assessment liability, said:

> "It may be regarded as settled that *upon acquiring stock* the stockholder incurred an obligation arising from the constitutional provision, *contractual in its nature* and, as such, capable of being enforced * * *

although the obligation is not entirely contractual and springs primarily from the law creating the obligation." (p. 529) (Italics inserted)

Early v. Richardson, 280 U. S. 496.

In this case this Court held that certain minor children were not liable for stock assessment upon shares which had been transferred to them upon the books of the national bank by their father, for the reason that "the transferees, being minors, were without legal capacity to assume the obligation." (p. 499) This reasoning clearly took into consideration the contractual nature of the obligation. *Gift v. Love,* 144 So. 562, 567, (decided November 21, 1932, by the Supreme Court of Mississippi) held, that the assessment liability "was rooted into and was a part of his contract of subscription to the stock." To the same effect: *Carlisle v. Love,* 155 So. 197, 203 (decided June 5, 1934); *Taylor et al v. Fontaine et al.,* 10 S. W. (2nd) 68, 72 (where the nature of the liability is discussed at considerable length).

CONCLUSION.

The equities in this case are with the depositors and creditors of the insolvent national bank. They have the right, under the law, to expect that national bank stock shall at all times be held by persons who are *sui juris* and therefore legally capable of responding to a stock assessment. See: Riley v. Bondi, 64 Fed. (2) 515; Keyser v. Hitz, 133 U. S. 138; Williams v. Vreeland, 250 U. S. 295; Foster v. Chase, 75 Fed. 797; Early v. Richardson, 280 U. S. 496; Aldrich v. Bingham, 131 Fed. 363. To insure this result, the law charges the record owner with liability, and he continues liable until a proper transfer is made upon the books to a transferee legally capable of taking title, and in the event of his death his estate is made liable by the provisions of the Federal statute. If the contentions of petitioner are to prevail, neither the estate of the record owner nor the hold-

ers of the assets derived from that estate are responsible, with the result that the depositors and creditors are deprived of the security intended for their protection in dealing with the bank. We submit that such a construction cannot logically and consistently be adopted in view of the purpose of the law.

The petitioner has no equities in his favor. It was through his willful, or at least conscious, failure, during a period of approximately eleven years as administrator, to have the stock transferred from the name of a dead man to a competent transferee, that the whole situation and the resulting litigation has been made possible. He cannot complain if the assets of the estate, thus permitted to remain subject to the assessment liability and acquired by him with notice, are held to be subject to a lien for the enforcement of such liability.

Respectfully submitted,

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